In the Supreme Court 1

OF THE UNITED STATES.

FIRST NATIONAL BANK,
of Grand Forks, N. D.,
Plaintiff in Error, 2

vs.

ALEXANDER ANDERSON,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

3

ON MOTION TO DISMISS AND AFFIRM.

I.

The motion presented by the defendant in error, being a motion to dismiss and affirm upon technical grounds without a full examination of the merits;

plaintiff in error respectfully submits to the court, that it is proper to point out, in the first instance, defects in the motion and motion papers on account of which the motion should be disregarded.

First. The notice, motion and motion papers furnished the attorneys for plaintiff in error and
4 filed, are subscribed in a co-partnership or firm name and not the name of an individual, as attorney for the defendant in error. Plaintiff in error is not advised that the several members of such firm, or any one of them, is an attorney of this court, or that there has been any appearance in this court, for defendant in error, by any attorney of this court, or any person authorized to appear or to move the
5 court to dismiss or affirm.

Second. The record has not been printed and cannot be printed prior to the hearing upon the motion. Where the record is not printed, motion to dismiss will not be considered. (National Bank vs. Insurance Company, 10 Otto, 43.) This is especially true where, as in this case, it is admitted that upon
6 the record this court has jurisdiction, and the motion is not made upon the ground that a federal question was not involved and decided, but upon the ground that the federal question so involved and decided was not necessary to the determination arrived at, and that the decision was manifestly correct.

In order to determine whether or not the federal

question was involved in the determination of the state court, and whether or not plaintiff in error has been wrongfully denied a right or immunity claimed by it under a statute of the United States, it will be necessary to look into the entire record.

This is also true where, as in this case, the decision of the federal question by the state court on 7
the face of it, is in direct conflict with the decisions of this, the Supreme Court of the United States. And when the decision of the state court can only claim support, if any, in some peculiar fact of the case to change and reverse the established law as to the powers and liabilities of national banks.

The printed extracts from the record or proceed- 8
ings in the court below, annexed to the motion, do not comply with the requirement that the record be printed in conformity with the rules of this court.

The printed extracts do not purport to be, and in fact are not, but a small part of the record in the state court. Nor are they but a small part of the record necessary for consideration upon the question 9
raised by this motion.

Third. There is no color of right to a dismissal, and therefore the motion to affirm should not be considered. (See Whitney vs. Cook, 9 Otto, 607.)

Defendant in error in effect admits that he has no right to claim a dismissal, and his motion and

motion papers show clearly that a federal question was raised and decided by the state court against plaintiff in error, and that plaintiff in error has been denied an immunity claimed by it under a statute of the United States, and the motion is merely a motion to affirm.

10 Fourth. This motion, while denominated a motion to dismiss and affirm, is in effect an attempt on the part of the defendant in error to submit the cause on the merits, and upon the very questions involved in the merits, upon extracts of the record of the court below, selected by himself, and is not within the provisions of any rule of this court allowing motions to dismiss or affirm.

11

II.

Passing next to the merits of the questions intended to be presented by the motion, plaintiff in error respectfully submits that upon the full record it conclusively appears.

That the federal questions raised by plaintiff in
12 error were necessarily involved in the merits of this action from its commencement, and in all the proceedings therein in the state, district, and Supreme courts. That a determination of such federal questions were necessarily involved in the decision and judgment of the State Supreme court, without which such decision could not have been arrived at, or such judgment rendered, by the state court, either upon

settled pre-existing rules of general jurisprudence, or even upon the state court's own construction and application of such general rules.

These federal questions may be combined into two general ones:

First. Is it within the powers of a national 13
bank to engage in the business of selling mortgage notes on commission?

Second. Is it within the powers of a cashier of a national bank to bind his bank by contract to assume the duties, obligations and liabilities of an agent for the sale of mortgage notes to third persons? 14

This is not a case where a national bank assumed to act as agent and thereby obtained possession of notes, and then by some tortious act converted them to its own use. The notes were pledged to, and rightfully in the possession of the bank long before it is claimed there was any suggestion of agency, and remained there throughout the transaction, and until long after the commencement 15
of this action, without change of form, location, condition or possession.

Nor is it a case where a national bank assumed to act as agent and as such deceived its principal to his injury. While defendant in error averred in his amended complaint that he relied upon the letters

and telegrams from the bank and was misled thereby and believed there had been a sale to a third party, this allegation was expressly denied in the answer, he offered no evidence in its support, the state courts excluded evidence offered by plaintiff in error that it was not true. The State Supreme court held it to
16 be immaterial, and neither court nor defendant in error claimed or ruled upon any deception as a basis for the pretended conversion.

Nor is this a case where a national bank by any tortious act or omission actually converted the property of another.

There is no pretense of any actual conversion of the notes.

17

The pretended conversion, according to the claim of the defendant in error, and the decision of the State Supreme court, is based solely upon the following narrow, technical grounds:

First. Certain letters and telegrams passed between the cashier of the bank and defendant in error, which were construed to constitute *in law* a
18 *contract* of agency, and that such construction was solely for the court, and the understanding of the parties thereto was wholly immaterial.

Second. That while this contract of agency existed, an attempted purchase or discount of the notes by the agent without the express consent of the principal would constitute a wrongful conversion

of the notes without regard to the intent of the parties.

Third. That the principal offered to sell the notes at a certain price and the agent assumed to become the purchaser and paid the price, and thereby wrongfully converted the notes.

19

We do not think that such would be the law anywhere except in North Dakota, even if plaintiff in error were a natural person instead of a national bank. It is, however, within the province of the Supreme court of that state to determine, and having determined it, it is the law of that state, and especially is the law of this case, except as to the federal questions involved.

20

Upon these grounds the judgment of the state court depends. Whatever question is necessarily involved in any of these propositions is necessarily involved in the judgment.

Even under this construction of the law the purchase or discount of the notes by the bank would not be in itself a wrongful act, nor amount to a conversion in the absence of a valid binding contract of agency.

21

The ruling upon the exclusion of evidence of the understanding and intent of the parties, and that the legal construction of the letters and telegrams by the court should alone be considered excludes all

pretense of an actual agency as distinguished from a legal one.

The pretended conversion consisted not in the commission of a wrongful act, but in the technical violation of a pretended contract. If the contract were not legal or valid, it follows that there was no
22 contract to violate. If it were a contract, which it was not, within the power of a national bank to make, there was no contract *in law* to be created by judicial construction from the letters of the parties. If the contract contained in those letters was not one which was within the powers of the cashier of a national bank to make on behalf of the bank, no
23 construction of their contents could create therefrom a valid contract or render an otherwise rightful act tortious.

What might have been the result had the bank in fact exercised any of the powers of an agent we need not discuss, for it is not claimed that the bank ever did exercise such powers.

24

What might have been the result had the defendant in error relied upon the bank as his agent is equally immaterial, for upon the record and the exclusion of evidence offered it must be conceded that he never considered the bank his agent for any purpose.

How a mere technical violation of an executory contract by an act otherwise rightful can amount to the commission of a tort we are not called upon to explain, we are not responsible for the decision that it does. We simply say that the conversion claimed and adjudged is just that conversion and none other, and that the existence of a valid, binding contract of agency is necessary to that kind of a conversion. 25

A contract of agency is the very foundation of this action, not an actual agency, nor the exercise of the powers of an agent, but a contract which prohibited the bank from accepting the offer of defendant in error to sell the notes at a price fixed by himself. 26

It is true the learned chief justice of the state court said in the opinion, that that court deemed the question of ultra vires immaterial. On that point the opinion of the state court does not govern. The statement is little more than dictum. It is inconsistent with the essential elements of the opinion, and is totally unsupported by the record. The course of reasoning is illogical. He says there was a contract, for the letters *in law* constituted one. There was an agency, for the contract *in law* constituted one. There was a prohibition against a purchase of the notes by plaintiff in error, because the agency *in law* constituted one. There was a conversion, because the prohibition and the purchase *in law* consti- 27

tuted one. And then, abandoning the premises, there being a conversion, which is a tort, it is immaterial whether there was any contract or not. Having arrived at his conclusion he says his premises are immaterial.

One expression of the opinion in this connection
28 deserves attention because it suggests an independent tort. It is said, "He," (the defendant in error) "never agreed to a purchase of the notes by defendant," (plaintiff in error) "and hence it follows that defendant's assumption of *ownership of them* constituted a conversion."

There is certainly nothing in the record which
29 remotely suggests any *assumption of ownership* by the bank. No act or claim of ownership by the bank is alleged in the complaint or intimated in the evidence. The alleged tort, if any, was in the act of purchase or attempted purchase, and not any subsequent act, omission or claim. The alleged tort, if any, was complete upon mailing the letter of October 7th, 1891.

30 What might be the effect, if it had been alleged and shown that the bank disposed of the notes or refused to return them upon a demand, we need not consider, for nothing of the kind is alleged or shown, on the contrary, the defendant in error by his election compelled the bank to retain the notes as owner.

It is true the bank in its answer avers a purchase directly from defendant in error as its version of the transaction; this allegation, however, certainly cannot be the *assumption of ownership* on which the action, commenced two and one-half years prior thereto, was based.

31

From whatever point of view we examine the action, we always come back to the one point, that the conversion, if any, consisted solely in the attempt of the bank on October 7th, 1891, by writing the letter and making the remittance of that date, to accept the offer of defendant in error and purchase or discount the notes itself. We say 32
attempt advisedly, for if defendant in error had not consented to such purchase, or did not consent to it, it was only an attempt, and that attempt, even under the legal principle enunciated by the state court, was not wrongful unless there existed a binding contract which prohibited the bank from offering to purchase.

Defendant in error claimed, and the state court 33
held that the authority of the cashier was not material, because the bank in its answer used the expression that the bank wrote the letter and made the remittance of October 7th, 1891, and also wrote defendant in error certain other letters, offering to purchase the notes from him. The language of the

state court is broad enough to include all letters as the act of the bank, but the answer is not.

The holding of the state court on this point does not control, but it lends the claim sufficient dignity to justify an answer. If the expression stood alone and unexplained it might amount to a formal admis-
34 sion that these particular letters were the acts of the bank in so far as any, or possibly all the officers, could make them its act. For being a corporation and not a natural person, the most specific and positive admission can amount to no more than that the officers of the bank wrote the letters and made the remittances in its name, but coupled with an express
35 statement of the facts and a copy of the letter showing it was written by the cashier, then to say the expression amounts to more than that the cashier wrote the letter is a mere play upon words.

These letters were no part of the alleged contract of agency which, as set out in the complaint, consisted only of a pretended telegram from the bank, dated October 3rd, 1891, and a telegram to the bank
36 dated October 5th, 1891. The pretended telegram from the bank was positively denied. The letter of September 14th, 1891, was neither referred to nor admitted in any pleading, while the agency was positively denied. The bank, by its cashier, by and in certain conversations, letters and telegrams had correspondence with defendant in error, wherein defend-

ant in error offered to sell the notes to the bank at certain discounts, and the bank offered to discount them at a greater rate of discount. The bank did this because it was done by the cashier for the bank, acting within his powers as cashier. When the cashier went outside his powers, and undertook to make a contract of agency, if he did, the act was not 37
the act of the bank, either in law or in fact. The bank offered to prove by proper evidence that no other officer or director or board of the bank participated in the transaction or authorized the cashier's acts. There is no question of ratification or estoppel by retaining the proceeds. The bank never claimed or held title or possession, or any right under the 38
agency.

Owing to the peculiarly technical character of the conversion claimed, we feel justified in making a brief statement of the transaction as it appears in the record.

About April, 1891, defendant in error pledged the notes to the bank. Between that date and October 7th, 1891, he wrote many letters offering to sell the 39
notes to the bank, and the bank offered to discount or buy them at certain prices. In his letters his offers to sell were based upon discounts *from the face* of the notes. It appears that he understood the expression "*the face*" to mean the principal and accrued interest. The cashier of the bank, on the

contrary, understood it to mean the principal sum only without interest. Defendant in error did not in any letter or telegram, either expressly or by implication, authorize or consent to any agency, unless the telegram of October 5th, 1891, "Will give discount of $500.00," contained such implied author-
40 ity, and in his letter of October 13th, 1891, he almost expressly repudiated any thought of agency by repudiating all charges and demanding from the bank as from a purchaser the balance of the price according to his understanding of the price fixed. His demand for such balance being refused by the bank defendant in error brought his action in March, 1893, for the alleged balance of such contract price,
41 $697.52, with interest after October 7th, 1891. A verdict was returned for the bank, and on appeal the verdict was sustained as to the principal issue, the amount of the contract price, but was reversed and remanded for a new trial on account of failure of proof of authority to pay, and payment of the charges for taxes, etc. In this opinion, however, the State Supreme court said the transaction was an
42 agency, and that the bank was the agent for the sale of the notes to unknown third parties. Acting upon this suggestion, upon the second trial defendant in error asked to amend his complaint to allege such agency, and that the bank sold the notes to itself and thereby converted the notes, etc., and for judgment for $1,232.52, substantially as contained in his

amended complaint, which amendments were refused on the grounds of a change of cause of action, delay, laches, and other causes, and a verdict was returned for defendant in error for the $102.52 charges and interest, and for the bank for the remainder, from which defendant in error appealed, and the cause was reversed and remanded for new trial with leave 43
to amend. The cause was tried a third time and verdict directed for the bank upon the ground, among others, that the alleged agency, if any, was ultra vires, either as the act of the cashier or as a contract by the bank itself. Upon a third appeal by defendant in error the State Supreme court held that the agency was within the implied powers of the 44
bank and not ultra vires, and remanded the cause for a new trial. Upon the fourth trial the bank, in order to properly present to this court the question of ultra vires, and that the pretended conversion was only a technical violation of a pretended executory contract of agency, challenged all pretended evidence of such contract of agency, and offered to prove by witnesses, sworn, examined and shown
competent, knowledge on the part of the defendant 45
in error before bringing the action that the notes still remained in the bank's possession, so he could have claimed them had he so chosen. Also his own construction placed by himself upon the contract, as he had personally stated it to the witness, that he had never considered the bank his agent for any pur-

pose, and that he had never authorized it to act as his agent for the sale of the notes, and of the construction placed by the bank on the transaction. The bank's evidence was excluded as tending to vary the terms of the written contract contained in the letters, and the court assumed that the construction
46 of that contract was for the court alone, also that the attempt to purchase during the existence of that contract was a conversion as a matter of law, and directed a verdict for defendant in error against the bank for the full amount claimed, and judgment was entered thereon. Upon the appeal by the bank from the judgment, the State Supreme court passed upon these questions: The admission of evidence of
47 agency, the exclusion of evidence of knowledge by defendant in error, and the construction placed upon the transaction by the parties, and sustained the ruling of the court below in each particular.

The exclusion of the bank's evidence was within the special jurisdiction of the state court, its determination thereon is final, and we cannot complain
48 of it here. Indeed, upon the state court's ruling that the attempt to purchase, without more, constituted a wrongful conversion, very probably renders the evidence immaterial. We have called this court's attention to it for the reason that it excludes all pretense of an actual conversion, or any conversion whatever, except upon the narrow, technical theory

we have stated, based solely upon a contract of agency.

III.

Even upon the partial record presented with the motion, that motion should be denied. It contains the amended complaint, and all the evidence tending 49
to show a wrongful conversion of the notes by the bank, and still at the utmost it presents only a technical violation, by the cashier, of an executory contract of agency entered into *by the cashier* that the bank would sell the notes for defendant in error, at a price fixed by himself, to some third person.

Divested of superfluous matter it, at the utmost, 50
shows that the cashier wrote two letters, that of September 14th, 1891, and October 7th, 1891, with remittances, and possibly a telegram of October 3rd, 1891. These were all acts by the cashier and no other act or omission is claimed.

It shows affirmatively (Folio 36) that defendant in error, with full knowledge of all the facts, in his amended complaint expressly waived the wrongful 51
element, if any, in the purchase of the notes, and elected to treat them as the property of the bank under the purchase.

The State Supreme court, contrary to the authorities and the legal principles applicable in such cases, held that defendant in error did not thereby

waive the right to demand and recover the full amount of the notes, principal and interest, as fully as in an action in trover. That a ratification of the purchase did not ratify the terms of that purchase.

That holding may be within the exclusive jurisdiction of the state court, and therefore finally settle
52 the law of the case as to the amount of recovery, but it goes no further.

It left the remaining effects of the waiver and election open, and it cannot be denied that by this waiver and election the defendant in error divested himself of all title to or interest in the notes at the date of the amended complaint, and that such
53 waiver and election reverted back to the time of the purchase thus ratified, vesting in the bank a perfect title on and at all times after October 7th, 1891, and that it prohibits him from complaining of any other or later act by the bank even if any had been shown, and restricts the alleged conversion to the attempted purchase thus ratified.

If there is any absurdity in holding that defend-
54 ant in error could expressly waive the wrongful element in the alleged sale of the notes by the bank to itself, and at the same time recover upon that act as a wrongful conversion; that he could waive the wrong and not waive the right to recover for it, that he could expressly ratify the sale or purchase, and at the same time recover damages because it was

wrongful; that he could ratify the purchase and repudiate the terms fixed by himself, we are not responsible for that absurdity, such was the decision of the State Supreme court against our most strenuous arguments. That we can have no redress against that decision does not render it any the le s important when it shows that the judgment is based 55
solely upon an agency which the bank had no power to undertake, and one created, if at all, by the unauthorized acts of the cashier, acting outside his powers, and in a matter outside the powers of the bank. Although defendant waived the tort and elected to sue as in assumpsit, or upon an implied contract to pay the actual value, the action none the
less rests upon the contract of agency. There is no 56
pretense of a recovery upon the terms of any con tract of sale.

IV.

One principal ground upon which plaintiff in error relies, and which appears in the record, is that the State Supreme court denied to it an immunity
claimed by it under the statutes of the United 57
States.

There is no question but that plaintiff in error throughout the proceedings in the state courts, did claim immunity against all liability on account of the alleged agency, upon the ground that the agency, if any, and all acts creating it, and all acts, if any,

done under it, were ultra vires, beyond the power of the bank as a bank, and beyond the power of the officers of the bank as such to do; and it is equally certain that the state courts positively denied that immunity. For the purpose of this motion it is wholly immaterial upon what ground the state
58 courts denied the immunity, whether upon the ground that the acts were within the powers of the bank, and its officers, or on the ground that the bank could not claim immunity against such acts, even if ultra vires. This court has just as full jurisdiction and power to relieve against an erroneous ruling on the last ground as on the first, and unless it mani-
59 festly appears that the decision of the State Supreme court was correct, there can be no ground for dismissal or affirmance on motion.

The question whether the agency and acts, if any, constituting a wrongful conversion of the notes was ultra vires, either as the act of the cashier or the bank itself, and whether, if so, the bank can set up that fact as a defense, are the real merits of the
60 case and should not be argued on this motion at any length. Upon these questions and especially that the bank can rely on the question of ultra vires, the case of California Nat. Bank. vs. Kennedy, 167 U. S. 362, 17 Sup. Ct. Rep. 831, and Farmers and Merchants Nat. Bank vs. Smith, 77 Fed. Rep. 129, by the Circuit Court of Appeals in the Eighth circuit,

we think sufficient authority that the judgment of the State Supreme court is not manifestly correct.

To the claim that the writ of error was improvidently allowed, or was sued out for delay only, we think no answer needed or justified and respectfully submit to the consideration of the court the foregoing objections to the motion.

Dated Grand Forks, North Dakota, December 29th, 1897.

W. E. DODGE,
Attorney for Plaintiff in Error,
Minneapolis, Minn.

BURKE CORBET,
Of Counsel, Grand Forks, N. D.

Supreme Court of the United States

Brief of Corbet for P. E.

OCTOBER TERM, 1898.

NO. 223.

Filed Oct. 24, 1898.

RST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

EXANDER ANDERSON,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Burke Corbet and W. E. Dodge, Attorneys for Plaintiff in Error.

The Plaindealer Co., Grand Forks, N. D.

Supreme Court of the United States

OCTOBER TERM, 1898.

NO. 223.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT.

This is an action at law brought in the District Court of North Dakota, March 25th, 1893, by the defendant in error, Alexander Anderson, a resident of Seattle, Washington, who was known in such District Court as plaintiff, and in the Supreme Court
2 of North Dakota as respondent, against the plaintiff in error, The First National Bank of Grand Forks, North Dakota, a banking corporation organized and acting under the National Bank Act, and known in the District Court as defendant and in the State Supreme Court as appellant.

The cause of action, if any, is based upon an alleged implied contract that the bank would pay Mr. Anderson the balance of the presumptive value on October 7th, 1891, that is the face and accrued interest then amounting to $7,630.00, of seven promisory notes for $1,000.00 each, dated October 1st, 1890, one due December 1st each year from 1891 to 1897 inclusive, with interest at 9 per cent., secured by mortgage on land, made by John A. Wilson and others, payable to, and owned by Mr. Anderson at all times prior to October 7th, 1891, and by him endorsed, assigned and transferred to the bank on April 6th, 1891, as collateral security for his note for a loan of $2,000.00 and which notes and mortgage he alleges the bank wrongfully converted to its own use October 7th, 1891, and remitted to him $6,397.48, being his note for $2,000.00 and cash $4,397.48, which he has ever since retained; he having elected to waive the tort and sue the bank on the alleged implied contract.

The conversion, if any, consisted in a technical violation of an alleged written contract of agency, in the form of letters and telegrams between S. S. Titus, as cashier of the bank, and Mr. Anderson, by the terms of which, it is claimed, the bank assumed and

undertook the duties and liabilities of an agent, to sell the notes and mortgages for Mr. Anderson to some third person,
3 that is, any purchaser, no third person being named or in any way was designated; and that the bank in violation of its duties as such agent assumed and undertook to purchase the notes itself and remitted therefor $6,397.48 as stated above, and thereby wrongfully converted the notes and mortgage to its own use. (See the amended complaint of the defendant in error in the printed record, page 2. The pages hereinafter cited, unless otherwise specified, refer to the pages of such printed record.)

Plaintiff in error expressly denied any agency or any conversion, denied that its business included any agency for the sale of notes, mortgages or other securities for the other persons, alleged a direct discount or purchase of the notes and mortgages by the bank directly from Mr. Anderson as a direct contract between principals, and alleged that the transaction was so understood by both parties, notwithstanding the technical legal construction placed upon certain expressions in the letters of the cashier, Mr. Titus. (See answer, pages 4, 5, 6 and 7.)

The facts established by the pleadings and evidence, and confirmed in the opinions of the State Supreme Court are that there was no actual conversion of the notes or mortgage or any of them, there was no disposition; destruction, concealment or unauthorized act of ownership. They had been duly indorsed, assigned and transferred to the bank April 6, 1891, as collateral security (page 2) and thereafter remained rightfully in the possession of the bank regardless of subsequent transactions, agency or sale. There was no change of possession, location or conditions of the paper except a rightful payment and cancellation of part of the notes, on or after maturity. There was no tender to the bank of the $2,000 loan, nor of the $4,397.48 remitted. Nor was there any de-
4 mand by Anderson for the paper or claim of the right to rescind the purchase by the bank. (Page 29.) Mr. Anderson's position was not changed by the transaction of October 7th, 1891, if there was such agency unless he saw fit to ratify the purchase by the bank, which he did by demanding the pretended balance and sueing for it in this form of action. (Page 3.)

These facts are important in the determination of the federal questions involved herein, for a national bank may be liable for an actual conversion and disposition of personal property, where it would not be liable for a technical violation of a contract to act as agent, which is ultra vires, either as the act of the cashier or the contract of the bank itself.

Evidence properly tendered on behalf of the bank by questions, and stated offers of evidence, and excluded, but preserved as parts of the record, and wholly uncontradicted, shows: That both parties considered the purchase or discount of the notes a direct contract between the bank and Mr. Anderson as principals. Pages 25, 26, 27, 28 and 29.) That Mr. Anderson never considered or relied upon the bank as his agent. That he stated after the commencement of this action that he always denied such agency, and claimed he had never written authorizing S. S. Titus, the cashier,

or the bank to act as his agent in any manner. (Pages 25, 26, 27 and 28.) Also, that two or three times prior to the commencement of this action Henry W. Phelps, attorney for the defendant in error, Anderson, and a member of the firm of Phelps and Phelps, then his attorneys in this matter, had conversation with S. S. Titus, the cashier, at the First National Bank in regard to the notes and transactions in controversy, in which Mr. Phelps acted on behalf of Mr. Anderson, in which conversations Mr. Phelps was told by Mr. Titus that the bank still owned the paper, and that Mr. Anderson, through his attorneys, had notice and knew that the paper was still in the possession and control of the bank as owner, and that instead of rescinding or demanding the paper he demanded the pretended balance of the purchase price. (Pages 26 and 27.) And evidence was introduced that H. W. Phelps as such attorney did demand the money instead of the paper or a rescission of the contract. (Page 26.)

Also: That thereafter on December 1st, 1892, prior to the commencement of this action, J. D. Phelps, the other member of Phelps & Phelps, Anderson's attorneys, knew that the notes were
5 still held by the bank and personally paid one of them to the bank by his check and had it sent to him. (Page 27.)

Also: That S. S. Titus had no authority other than his implied authority as cashier of a national bank, to bind his bank by contract or otherwise. That the board of directors of this bank never took any action upon, or in any manner constituted or authorized the bank, or Mr. Titus in its behalf, to be, or to act as, or assume the duties of an agent for Mr. Anderson for the sale of the notes and mortgage. (Page 30.)

Also: That the actual value of the notes and mortgage, October 7th, 1891, did not exceed $6,000.00. (Pages 30 and 31.)

Also: An explanation of the reference to third parties in the telegram of August 31st, and the letters of September 3d and 14th, 1891, that one R. M. Sherman, of Spokane, Washington, secretary of the Vermont Loan & Trust Company, was at Grand Forks in August and again in October, and offered to take the paper from the bank if it could obtain Anderson's interest in it, but that after the bank had obtained, or attempted to and supposed it had obtained such interest, Sherman declined to take the papers unless guaranteed by the bank, which the bank refused to do, and the paper was left in the bank's hands. (Pages 29 and 30.) The foregoing tenders of evidence were all excluded.

The letters and telegrams constituting the alleged contract of agency are so important as to justify a full abstract of them in this statement, and are here presented in chronological order.

August 11th, 1891, the notes and mortgage then being in the possession of the bank, the notes duly indorsed, (page 2), and the mortgage and notes, duly assigned in writing, constituting a conveyance thereof, and of the legal title thereto, to the bank, absolute in form, (page 2), but in fact as collateral security for Anderson's debt of $2,000.00; he wrote. "Exhibit 1." "Seattle, Wash., Aug. 11, 1891. Mr. S. S. Titus, Grand Forks, N. D. Dear

Sir: Any time you feel like buying those notes of mine let me hear from you. Alex. Anderson." (Page 17).

Answered, August 17th, 1891. "Exhibit 4," (page 18). "Alexander Anderson, Seattle, Washington: Your favor of the 11th received. The offer coming from you, you have neglected
6 to say what you will take for the paper. . . . . We may take the paper from you if it can be had at a discount that will warrant us in accepting it, but until we hear from you again we can give no definite answer. You will have to make a very liberal offer before we will take even the time, or go to the expense of looking it up. S. S. Titus, Cashier."

"Exhibit7," a letter, (page 18). "Seattle, Wash., Aug. 27, 1891. S. S. Titus, Grand Forks, N. D.: Dear Sir: Your letter of the 17th is to hand regarding notes. . . . . I would be satisfied to give a discount of five per cent. on face. Very respectfully. Alexander Anderson."

"Exhibit 8," memorandum of a telegram sent to Mr. Anderson by Mr. Titus regarding these notes and mortgage (page 19). "Wired him. If accepted now, a party is here, so we can send you $4,000.00 together with your note. You to make the title good if anything comes up. Answer by wire at once. Aug. 31, '91. 1st Nat. Bk."

"Exhibit 9," a letter, (page 19). Grand Forks, N. D., Sept. 3, 1891. Alexander Anderson, Seattle, Wash.: August 31 we wired you. 'If accepted now, a party is here, so we can send you $4,000.00 together with your note. You to make title good if anything comes up. Answer by wire at once.' We overlooked confirming the same the same day. As yet we have received no reply and came to the conclusion that you do not wish to sell the paper. Money is very close here now and is going to be all over the northwest, no matter how large the crop is. S. S. Titus, Cashier."

"Exhibit 10," a letter, (page 19). "Seattle, Wash., Sept. 8th, 1891. S. S. Titus. Dear Sir: Yours of the 3d inst. is at hand. I do not wish to sell the notes for the figures you offer. If you send $4,000.00 and note, balance some other time, it is all O. K. I wrote you saying I would give a discount of five per cent. on face of notes. Yours respectfully. Alexander Anderson."

"Exhibit 11," a letter, also identified as Exhibit E," of the personal deposition of Alexander Anderson taken at Seattle,
7 Washington, May 29th, 1893, (pages 15 and 19). "Grand Forks, September 14th, 1891. Mr. Alex. Anderson, Seattle, Wash. Dear Sir: We never make a trade in the way you mention, that is, pay a part and later on send or pay more; we, if we make a trade with any one, always close it up at once, then it is complete and out of the way. If I had a basis to work on, I might find some one who would take the paper. You offered it at $350.00 discount; we offered you a trade at $1,000.00 discount; now if you will make it $700 or $800 and allow us a small commission, I will try and place the paper for you. You as I wrote you to make the title clear and straight if anything should come up in the deal. . . . . If you care to have us go to work on these terms, you write or wire me. Yours, S. S. Titus, Cr."

"Exhibit "A" of Anderson's personal deposition, being the same

as "Exhibit 13" of Titus' testimony, was a paper purporting to be the receiver's copy of a telegram, claimed to have been received by Mr. Anderson at Seattle, Washington, but not connected with the bank or any of its officers, and concerning which S. S. Titus testified repeatedly he had no knowledge, except that he had seen and copied it on the back of a telegram of later date after the commencement of this action, and had no recollection of ever having sent or seen the telegram or any such telegram prior to the commencement of this action, nor of sending any telegram to Mr. Anderson on or about that date, (see pages 20, 21 and 22) was as follows: "Received at Seattle, Wash., Oct. 3, 1891. Alex. Anderson, Seattle: Did you receive our letter September 14th. Wire us you best offer, so we can advise a party who said he would hold his money until we heard from you. First National Bank." (Page 12.)

"Exhibit B" of Anderson's deposition, copy of telegram, also set out in the amended complaint and answer, and being "Exhibit 12" of Titus' testimony (pages 5, 13 and 20). "Seattle, Washington, Oct. 5, 1891. First National Bank, Grand Forks, N. Dak. Will give discount of five hundred dollars. Alex. Anderson."

"Exhibit C" of Anderson's deposition (pages 5, 13 and 22).

8 "Grand Forks, N. D., Oct. 7, '91. Mr. Alex. Anderson, Seattle, Wash. Dear Sir: Your wire of Oct. 5 to hand.

Discount	$ 500.00
Half per cent. commission for selling the paper	35.00
Release and record of $80 mortgage given Gates	2.00
Record of Assignment	1.50
1890 Taxes you stipulated to pay	47.02
Attorney to examine abstract	5.00
Continuing abstract	4.50
Exchange on New York	7.50
Draft for balance	4,397.48
	$7,000.00

Returns for J. A. Wilson seven notes. In my judgment this is a good trade for you. Yours. S. S. Titus, Cr."

"Exhibit D" of Anderson's deposition (pages 6 and 14). "Seattle, Washington, Oct. 13, 1891. First National Bank, Grand Forks, N. Dak. Gentlemen: Your letter with enclosed draft for $4,397.48 and note of $2,000.00 is at hand, which I cannot accept. I wired you I would give a discount of five hundred dollars, and you make a discount of about $1,175. I did not agree to pay any other expenses. Those notes call for $7,000.00 and $630.00 interest. I shall expect balance of money by return mail. Yours respectfully. Alex. Anderson."

Mr. Titus also testified that the notes were entered in the bank's record of bills receivable as of the date October 7th, 1891. (page 17) and that he purchased the notes from Alexander Anderson personally. The exact form of the question and answer being "Question by Mr. Phelps. 'From whom did you purchase these notes, Mr. Titus, the person?. Answer. 'Alexander Anderson.'" (Page 23).

The foregoing letters constitute all the correspondence between the parties in relation to the sale of the notes, and all the evidence of the contract of agency, if any, and the terms of such agency. They with the testimony of Mr. Titus were each offered in evidence and introduced by and on behalf of Mr. Anderson by his attorney and against the objections of the bank interposed, to each of such letters and telegrams. The elipses indicated in Exhibits 4, 7 and 11 (E) being the letters of August 17, 1891, August 27,
9 1891, and September 14, 1891, consisted merely of opinions as to the probable condition of the money market and the security of the notes. And this correspondence with the tenders of evidence on behalf of the bank and testimony of Mr. Titus disclose the entire transaction.

The original dispute between the parties was as to price to be received by Mr. Anderson for the notes. He claimed, and we presume honestly, that he should receive $7,130.00, including his note for $2,000.00, being $7,000.00 principal and $630.00 accrued interest, less $500.00 discount. (See his letter of October 13th, 1891, pages 6 and 14). While in view of the entire correspondence, especially Mr. Anderson's letters of August 27th (page 18) and Sept. 8th (page 19) in each of which he offers to discount the notes "Five per cent. on the face of the notes," in other words, to take $6,650, being the face of the notes, $7,000.00, less five per cent., $350.00, and also Mr. Titus' letter of September 14th, 1891, (page 15), which informed Mr. Anderson of the bank's understanding of his offers, which letters referred to the above offers, and the bank's offers in the telegram of August 31st, (page 19), and letter of September 3d (page 19) to send him $4,000.00 and his note, $6,000.00 in all, being a discount of $1,000.00 from the principal of $7,000.00 The letter of Sept. 14 containing this statement: "You offered it (the paper) at $350 discount; we offered you to trade at $1,000." Mr. Titus believed that the telegram of Oct. 5th: "Will give discount of $500.00" was simply an increase of the discount from $350.00 to $500.00, or a reduction of the price from $6,650.00 to $6,500.00, and also believed that the correspondence contemplated that Mr. Anderson should pay necessary expenses of clearing up the title.

This dispute placed the correspondence in the hands of Mr. Anderson's attorneys, who evidently relying upon the agency and commission by the letter of October 7th, brought the action in this form without any attempt to rescind or demand for the paper.

There were four trials in the District Court, the last on February 2d and 3d, 1897, on which trial the court directed a verdict against the bank. Motion for new trial was denied May 14th, 1897, and judgment rendered on the verdict against the bank June 3d, 1897, for $1,914.70, from which it appealed to the State Supreme Court, which decided against the bank, denied a petition for rehearing, and rendered judgment against the bank for the full amount and costs of the appeal, and the bank having exhausted every remedy in the court of last resort of the State of North Dakota,
10 brings the cause to this court on writ of error for an examination of the federal questions raised in the state courts

and decided against the bank; especially an immunity claimed by it under the statutes of the United States, and which was denied by both the District and Supreme Courts of North Dakota. The specific federal questions involved and the record of the manner in which they arose appear in the specifications following and the parts of the record cited therein.

SPECIFICATION OF ERRORS.

Plaintiff in Error, The First National Bank of Grand Forks, North Dakota, and the defendant and appellant in the District and Supreme Courts of North Dakota, as a part of this, its brief, makes the following specifications of errors which it avers occurred upon the trial of this action in said State Supreme Court, and on which it will rely upon the further proceedings in this action.

Plaintiff in Error relies upon the several errors assigned and set out in its assignment of erros annexed to and presented with its petition for a writ of error in this case (see printed record, pages 47 to 52 inclusive) and which by reference was pointed out and referred to as its statement of errors in the stipulated record. (See printed record, page 52) and which are herein specifically set out as follows:

I.

The Supreme Court of North Dakota erred in denying appellant's, this plaintiff in error's, assignment of errors, committed by the District Court of that State upon the trial of this cause in such District Court, in the admission of defendant in error's evidence, and wherein the State Supreme Court erroniously ruled and adjudged that the District Court did not err in admitting such evidence in the following instances:

(1.) In assignment of error number one (1), (printed record, pages 11, 32, 35 and 48), that the district court erred in overruling and denying plaintiff in error's objection made at the first offer of evidence in behalf of defendant in
11 error, wherein plaintiff in error objected to the introduction of any evidence on behalf of defendant in error, for the reason that the complaint does not state facts sufficient to constitute a cause of action, "which objection was overruled by the district court, and exceptions to such rulings were duly taken, allowed and preserved, and which ruling was affirmed by this, the Supreme Court of North Dakota. The complaint stating a pretended cause of action, which on the face thereof was based upon a pretended contract on the part of the defendant bank, this plaintiff in error, which by the statutes of the United States was not within the power of a national bank to make, and upon the face thereof was ultra vires and void.

(2.) In assignment of erros number fifty (50), (pages 10, 15, 32, 33, 35 and 48), that the district court erred in overruling and denying defendant, plaintiff in error's, objection to Exhibit "E," the letter dated Grand Forks, September 14th, 1891, addresed to Mr. Alexander Anderson, Seattle, Wash., and signed S. S. Titus, Cr., wherein is contained the pretended offer to act as agent in the fol-

lowing words: "If I had a basis to work on I might find some one who would take the paper. You offered it at $350.00 discount; we offered you a trade at $1,000.00 discount. Now if you will make it $700.00 or $800.00 and allow us a small commission, I will try and place the paper for you." Which ruling by the district court was affirmed by this, the Supreme Court of North Dakota, although the contract sought to be established thereby was one which under the National Bank act, a statute of the United States, was not within the powers of a national bank to make, or to perform, and was ultra vires and void, and under such statute it was not within the powers of a cashier of a national bank to bind his bank by contract to assume the duties and obligations of an agent for the sale of notes and mortgages to third persons, and the act of the cashier in writing such letter was ultra vires and void.

(3.) In assignment of errors number seventy-four (74), (pages 19, 20, 32, 35 and 48), concerning like objections to the introduction in evidence of the same letter as Exhibit Eleven (11) upon identification thereof by the witness, S. S. Titus.

(4.) In assignment of error number ninety (90), (pages 26, 31, 32, 35, 48 and 49), wherein the district court erred in overruling and denying defendant's, plaintiff in error's, motion to strike
12 out the letter of September 14th, 1891, being Exhibit "E," and also identified as Exhibit "11" as above stated, on the ground that it was ultra vires and also not shown to have been the act of the bank, which erroneous ruling was affirmed by the supreme court of North Dakota, althouh the contract of agency held by such court to be established thereby was as the contract of a national bank ultra vires under the National Bank Act, and the act of the cashier in undertaking to bind his bank by such contract was ultra vires under said act.

(5.) In assignment of errors number one hundred and forty-seven (147), (pages 33, 35 and 49), concerning the admission of said letter, Exhibit "E," admitted over defendant's objections and the admission adjudged to be proper by the Supreme Court of North Dakota.

(6.) In assignment of errors number one hundred and forty-five (145), (pages 32, 35 and 49), wherein defendant, plaintiff in error, assigned error in admitting evidence of the pretended telegram of October 3d, 1891, as follows: "Did you receive our letter September 14. Wire us your best offer so we can advise a party who said he would hold his money until we heard from you. First National Bank." Upon the ground that there was no evidence of the identity or authority of the writer or sender, if any, and the agency, if established, was ultra vires, and the act of any officer contracting that the bank would act as agent would be ultra vires, which express claim for immunity against liability both on account of ultra vires acts of the cashier, and also on account of ultra vires contracts by the bank itself was by the Supreme Court of North Dakota erroniously denied.

II.

The court erred in denying defendant's, plaintiff in error's, assignments of errors committed by the district court of North Dakota upon the trial of said cause in said district court in the rejection of evidence offered by the defendant, plaintiff in error, which erronious rulings were affirmed and sustained by the supreme court of North Dakota, which court erroneously denied defendant, plaintiff in error, a reversal of the judgment of said district court, and erroniously affirmed said judgment against it in said action, notwithstanding such errors by the court below, and that the said erroneous rejection of evidence was in the following instances, to-wit:

(1.) In assignment of error number one hundred and twenty-three (123), (pages 30, 32, 33, 35, 49 and 50), wherein J. Walker Smith, president of the board of directors of the defendant
13 bank, this plaintiff in error, was produced, sworn and examined as a witness on its behalf, and shown competent to testify to the facts, and was asked: "Did the board of directors of the defendant bank in any way ever authorize Mr. Titus to act for and on behalf of the bank constituting the bank thereby the agent of the plaintiff for the sale of the notes in litigation?" which question was objected to by the plaintiff, this defendant in eror, on the ground that it was incompetent, irrelevant and immaterial, which objection was erroniously sustained by the district court, and exceptions to such rulings were duly taken, allowed and preserved, and duly submitted to the supreme court of North Dakota, wherein such rulings were erroneously affirmed and judgment rendered against plaintiff in error, notwithstanding such error, though under the statutes of the United States, the cashier, Titus, could not render plaintiff in error liable as agent by his acts without such express authority, and any act on the part of such cashier attempting to contract for or on behalf of the bank that it would assume or undertake any of the duties, obligations or liabilities of an agent for the sale of said notes to the third parties, if established, was ultra vires and void.

(2.) In assignment of errors number one hundred and twenty-four (124), (pages 30, 32, 33, 35 and 50), wherein plaintiff in error offered to prove by said witness, J. Walker Smith, that the defendant bank did not in any way, either by its board of directors or otherwise, ever authorize S. S. Titus, its cashier, to act for and on behalf of the defendant bank, constituting the bank the agent of the plaintiff, defendant in error, for the sale of the seven promissory notes in litigation, which evidence the district court erroneously excluded upon the objection that it was irrelevant, incompetent and immaterial, to which ruling exceptions were duly taken, allowed and preserved, and duly submitted to the supreme court of North Dakota, wherein said ruling was erroneously affirmed, and judgment has been erroneously rendered and entered against plaintiff in error, notwithstanding such error, although it manifestly appeared that such ruling was in conflict with the statutes of the United States, and denied to defendant a right, privilege

and immunity claimed by defendant under such statutes that it should not be liable for ultra vires acts of its cashier.

(3.) In assignment of errors number one hundred and twenty-five (125), pages 30, 32, 35 and 50), wherein plaintiff in error offered to prove by said witness, J. Walker Smith, that its board of directors never took any action constituting the bank or its cashier, S. S. Titus, on behalf of the bank, the agent of Alexander
14 Anderson for the sale of the seven promissory notes, which evidence was erroneously excluded by the district court upon the same objections and such ruling, duly presented and submitted in the supreme court of North Dakota was erroneously affirmed and judgment erroniously entered, though such ruling erroneously denied a right, privilege and immunity expressly claimed by plaintiff in error under the National Bank act, a statute of the United States.

(4.) In assignment of error number one hundred and fifty-four (154), (pages 33, 35, and 50), wherein plaintiff in error assigned as error that the district court erred in excluding the testimony of J. Walker Smith that no authority was conferred upon any officer to, nor was any steps taken whereby the bank could engage to act as agent for the sale of these notes, or otherwise, such facts being material relevant and competent, because any contract to that effect is ultra vires, and not within the implied or customary powers of officers of national banks, which claim for immunity from ultra vires acts of officers and from liability on account of ultra vires contracts by national banks themselves thus expressly set up was erroneously denied by the supreme court of North Dakota.

(5.) In asignments of errors numbers eighty-six (86), one hundred (100), and one hundred and one (101), (pages 25, 26, 27, 28, 32 and 35), wherein plaintiff in error assigned as error that the district court erred in excluding the testimony of the witness, S. S. Titus, both on cross examination against, and on direct examination as witness for the bank, that the conversation witness had with Alexander Anderson, defendant in error, in December, 1895, after the third trial, at Seattle, Washington, was in regard to this case and the transactions out of which it arose, that in such conversation Mr. Anderson made certain admissions, and what that conversation was. Also in excluding the offers of plaintiff in error to prove by such witness, that at such conversation Mr. Anderson admitted to witness that he, Anderson, "Never considered plaintiff in error as his agent. That he denied the agency and refused to allow $35.00 commission and had never written authorizing Titus or the bank to act as his agent in the matter in any manner." All of which testimony and proof was competent and material not only on the question of the fact of a contract of agency but also on the question whether plaintiff in error can raise the question of ultra vires in such contract, or in other words, whether the alleged conversion was an actual conversion of the property or a mere technical violation of a written contract of agency which was not understood by the parties to be such.

(6.) In assignment of errors number eighty-eight (88), (page 26), ninety-seven (97), (pages 26 and 27), and ninety-eight (98), page (27),

wherein plaintiff in error assigned as errors, that after the witness S. S. Titus, testified "I am acquainted with Mr. H. W.
15 Phelps, the gentleman sitting there, attorney for plaintiff. I had a conversation with him prior to the commencement of this action in reference to these notes at the First National Bank. He was in two or three times to see me about the paper. He made a demand on me for the money in connection with this same matter." (Pages 26 and 27.) The district court erroneously excluded the testimony of the witness as to what the conversations were; that defendant in error prior to the commencement of the action through his attorneys had notice and knew that the bank held and claimed to own the paper, and therefore, if his present contention as to agency be correct defendant in error could have tendered back the remittances of October 7th, 1891, and demanded the notes and mortgage. Also erroneously excluded the offers of plaintiff in error to prove by this witness that at the times he had the conversation with Mr. Phelps and when this subject was under discussion. He, Mr. Phelps, was acting for and on behalf of Mr. Anderson, defendant in error, in this action; that the witness then stated to him that the bank was the owner of the paper, the subject matter of the action. All of which testimony and proof was competent, relevant and material, not as a declaration of ownership in its own interest, but as evidence that defendant in error had due notice before bringing the action that the notes were within the control of the bank and he had due opportunity to rescind by tender and demand, which he did not do but demanded an alleged balance of money instead. Which is proper evidence that there was no actual conversion, but at most a technical violation of an executory contract of agency, which plaintiff in error claimed was ultra vires.

III.

The supreme court of North Dakota erred in denying to defendant, plaintiff in error, the immunity conferred upon it as a national bank by the statutes of the United States, that it should not be liable on account of ultra vires acts of its cashier, and not even by ultra vires contracts by the bank itself, which immunity was expressly claimed by defendant in the district court wherein the case was tried, and in the supreme court of said state when brought there upon appeal in each of the foregoing instances, and in the following instances, to-wit:

(1.) In assignments of errors number one hundred and fifty-six (156), (pages 32, 35 and 51), wherein defendant, plaintiff in error, assigned as error that the district court erred in directing a verdict for defendant in error for the amount directed, or for any amount, which ruling was affirmed by the supreme court of
16 North Dakota, although the verdict was based upon a complaint which set up a cause of action solely upon an ultra vires contract, and was supported, if at all, only by evidence of such ultra vires contract, made by the defendant's cashier without authority.

(2.) In assignment of errors numbered third (III), (pages 35 and

51), of the assignments of errors annexed to and written out at length at the close of its brief, in such state supreme court, wherein plaintiff in error assigned error as follows: "Appellant" (this plaintiff in error) "further says there was manifest error" (by the district court) "in rendering judgment against it in this action for each of the foregoing reasons, and particularly because such judgment denies to appellant immunity afforded by the statutes of the United States to national banks against liability on account of ultra vires acts of their officers and ultra vires contracts of the banks themselves." Which erroneous judgment was erroneously affirmed by the supreme court of North Dakota, notwithstanding such claim and right to immunity under said statutes of the United States.

IV.

The supreme court of North Dakota manifestly erred in denying to plaintiff in error, by giving judgment against it, the immunity claimed and set up by it under the statutes of the United States against liability on account of ultra vires acts of its cashier, and ultra vires contracts by the bank itself, whereon alone judgment was demanded and rendered. (Page 51.)

V.

The supreme court of North Dakota erred in denying defendant's, plaintiff in error's, petition for a rehearing upon the ground that such court had overlooked and disregarded the record and the law applicable thereto in relation to the want of power of authority of the cashier of a national bank to bind his bank by contract to assume the duties and responsibilities of an agent to sell notes and mortgage for defendant in error to a third person. Also that said supreme court overlooked and disregarded the record and the law applicable thereto in relation to the power of a national bank itself in any manner by contract to assume the duties and responsibilities of such agent, and has thereby denied plaintiff in error a right, privilege and immunity claimed by it under the statutes of the United States. (Pages 51 and 52.)

ARGUMENT.

The record in this case is unnecessarily long, a condition for which plaintiff in error is not entirely if at all to blame,
17 a great part having been presented by defendant in error. Most of the facts, evidence and proceedings are important only as showing whether the federal questions presented are necessarily involved in the merits of the action.

I.

Plaintiff in error submits that the federal questions presented herein were necessarily involved in the merits of this action from its commencement, and in all the proceedings therein, in the district and supreme courts of North Dakota. That a determination of such federal questions were necessarily involved in the decision and judgment of the state supreme court, without which such

decisions could not have been arrived at or such judgment rendered.

The questions presented in this brief were each raised and decided in the state, district, and supreme courts, in proper form and manner. And there was no independent ground, not involving such federal questions, on which the decision and judgment of the state court could be, or was in fact predicated.

Plaintiff in error submitted a short brief on the necessity for a determination of the federal questions, and the right of the bank to claim immunity from liability under federal statutes, in January, 1898, upon motion to dismiss writ of error, to which it respectfully refers the court on this point.

The primary questions presented are:

First: Is it within the power of a national bank to engage in the business of selling mortgage notes on commission?

Second: Is it within the implied powers of a cashier of a national bank to bind his bank by contract to assume the duties and liabilities of an agent for the sale of notes and mortgages to third persons?

Other and secondary questions arise which are federal questions because their determination establishes or tends to establish the existence of the above primary questions as necessary elements of the judgment and support the claim of the bank for immunity, under federal statutes, against liability on account of ultra vires acts of its officers and ultra vires contracts of the bank itself, if any.

II.

The powers of the bank itself, under the National Bank act, to engage in the sale of mortgage notes on commission is directly and necessarily involved in the merits, and in the determination of this case.

A contract of agency for the sale of the notes and mortgage is the primary element in the allegation of a wrongful conversion in the amended complaint (paragraphs V. and VI., page 2) and the second element of such conversion, the alleged sale of the
18 notes by the bank itself is claimed to be wrongful only because of such contract. "And the defendant wrongfully and in violation of its duty as plaintiff's agent for the sale of said seven promissory notes converted said notes to its own use, and sold the same to itself."

There is no claim or pretense of any conversion, either in the pleadings, the evidence, or in the opinion of the state supreme court, other than the so-called sale of the notes by the bank to itself.

In the opinion of the supreme court of North Dakota the fact of such contract of agency is treated as of the utmost importance (pages 36 and 42) and the fact of conversion was therein based wholly on such contract and the so-called sale by the bank to itself. (Pages 42 and 43.)

The agency therein referred to deserves special consideration. It was wholly the creation of express contract. It was an agency.

or a contract of agency in law by a judicial construction of the correspondence which excluded the actual understanding of the transaction by the parties. (Page 42.) There was no allegation in the amended complaint of any actual agency, or the exercise of the powers of an agent, but only of two specific telegrams which if proved would establish a contract of agency. (Page 2.)

The so-called sale of the notes by the bank to itself also needs consideration. It is undisputed that October 7th, 1891, the bank attempted to purchase, supposed it had purchased, and has ever since claimed it did purchase the notes from Mr. Anderson. It is also undisputed that the only act of the bank, or of any one for the bank in the transaction of the so-called sale to itself, was that Mr. Titus as cashier for the bank wrote the letter of October 7th with the remittance of $6,397.48 to Mr. Anderson and entered the notes in the bank's register of bills receivable.

The bank claimed the transaction was a purchase from Mr. Anderson directly without the intervention of any agency, and that it was so understood and intended by both parties. The defendant in error by his attorneys claimed (pages 26 and 28) and the supreme court of North Dakota decided (page 42) that the intent and understanding of the parties was immaterial, irrelevant and incompetent because the letters and telegrams in evidence constituted, in law, a written contract of agency, the construction of which was for the court alone.

The bank denied that it sold the notes to itself, and it never claimed any title or interest under or by virtue of any agency; but the theory of Mr. Anderson's attorneys and of the state supreme court is that the bank must have, and in law did sell the notes to itself because of such contract, and the act of writing the letter of October 7th, 1891. (Pages 42 and 43.)

The bank denied any conversion. But the theory of the attorneys for the defendant in error, and the opinion of the state
19 court was that the bank must have, and in law, did convert the notes, because there was, in law, such written contract which with the letter and remittance of Oct. 7 constituted in law a sale of the notes by the bank to itself, which in turn constituted, in law, a tortious conversion regardless of the understanding or intent of the parties (pages 26, 28, 12 and 43). We believe this theory and decmision is entirely erroneous, and would be so even if the plaintiff in error had been a natural person instead of a national bank; but right or wrong it is a decision every step of which rests finally upon the legal effect of the letters and telegrams as constituting a binding contract that the bank would assume, and did by such contract, not otherwise, assume the duties and liabilities of Mr. Anderson's agent to sell the notes and mortgage for him to third persons.

The theory of defendant in error as disclosed by his brief on motion to dismiss, is that the decision of the state supreme court is final upon every question except the two primary ones, whether the pretended contract of agency was ultra vires either as an act of the cashier or as a contract by the bank itself; and therefore its decision that the question of ultra vires was immaterial, and that

the evidence conclusively showed a contract of agency, a sale by the bank to itself, and a tortious conversion of the notes is final and disposes of the case.

It is certain, however, that the final decision, whether the federal questions are material and necessarily involved in the action, is for this court and not the state court. It is equally certain that every preliminary and collateral fact which establishes or tends to establish the materiality of such federal questions, and the necessity of a determination of them may be considered by this court.

If the conversion were actual and not dependent upon the pretended contract of agency, or if there had been an actual sale of the notes by the bank as agent to itself as purchaser with a claim of title or interest under such sale, then a decision by the state supreme court that there had been such actual conversion, or such actual sale might be final as not involving any federal question. But when all the elements of the so-called conversion and sale are set out, one of which, and a necessary one, is the pretended contract of agency which does involve a federal question, this court will go back of the so-called conversion and sale to the contract and decide the federal question.

It is true the learned chief justice of the state supreme court said in the opinion (page 43) that that court deemed the question of ultra vires immaterial. On that point the opinion of the supreme court does not govern. The statement is inconsistent with the essential features of the opinion, is totally unsupported by the record and is illogical. He says there was a contract of agency for the letters and telegrams, in law, constituted one. There was an agency, for the contract, in law, constituted one. There was a prohibition against a purchase of the notes by the bank, because the agency, in law, constituted one. There was a tortious conversion of the notes because the prohibition and the admitted purchase, in law, constituted one, and then abandoning the premises he says, since there was a conversion which is a tort it is immaterial whether there was a contract or not. Having arrived at his conclusion he says his premises are immaterial.

We do not claim that a national bank may not be liable for the wrongful conversion of personal property. Nor do we claim that a national bank can escape liability for an actual conversion of personal property because it obtained possession under a contract which was ultra vires. We assume that if a national bank as pledgee, agent, factor or bailee of any kind have possession of the property of another, and then without authority use, alter, transfer or dispose of it, or wrongfully retain possession after proper demand and tender by the owner, or if it deceive the owner and prevent such demand and tender, or if in any unauthorized manner it deprive the owner of any use, possession or right in the property such unauthorized act would constitute a tortious conversion, whether the contract or bailment were ultra vires or not. Indeed the original action of trover was based upon an actual or alleged finding of the property, and not upon any contract. And the tort consisted in the subsequent unauthorized appropriation of the

property to the use of the finder to the exclusion of the owner's rights.

We do claim that when the so-called conversion is based primarily upon an alleged contract of agency without which it is not pretended there would be any conversion, then such contract must be a valid contract within the power of the alleged wrong doer to make.

It was error to predicate a tortious conversion upon the so-called agency, the correspondence and all the acts of the bank and its cashier; and it would have been error even if done by a natural person instead of a national bank. The bank was rightfully in possession of the notes and mortgage as pledgee at all times after April, 1891, without using or changing their condition or denying to Mr. Anderson any possession, use or right in them. It is not pretended that Mr. Anderson demanded the notes or tendered the $6,397.48 advanced on them or the $2,000.00 loan, for which they were pledged. It is not pretended that Mr. Anderson and his attorneys did not know all the facts of the transaction, or that
21 he was in any manner prevented from demanding the notes and tendering the advances. On the contrary his amended complaint expressly avers the purchase by the bank and a demand for the difference in money instead of for the notes. It is not pretended, except by an allegation in the pleadings unsupported by any evidence, that he relied upon or considered the bank as his agent in the matter and the exclusion of the testimony of Mr. Titus (pages 26 to 28) of Mr. Anderson's personal admissions that he, Mr. Anderson, had never considered the bank his agent excludes from consideration any pretense of reliance or trust.

But erroneous or not the decision would be final except as it involves federal questions. It is important, however, to consider these collateral facts as exactly defining the kind of conversion relied on in this case as one which rests primarily upon a contract. It is that kind of a conversion or none.

Again, the decisions of the state supreme court that the contract was a contract of agency, the sale therefore, a sale by the bank to itself, and the transaction therefore a wrongful conversion, since each confessedly rests primarily upon the letters and telegrams of the cashier as a contract agency, amount only to so many names or labels for the correspondence and acts of the cashier and upon that correspondence and such acts as within or beyond the powers of the cashier of, or within or beyond the corporate powers of national banks themselves, the questions in this court plainly rest. The state court labels of "agency" and "conversion" do not in this case forbid an examination of the record behind them.

Another reason why the federal questions are necessarily involved in the merits of the action is that the action is on a contract and not in tort. Defendant in error with full knowledge of all the facts expressly waived the tort, if any, and elected to sue on contract. The exact language of his amended complaint is (page 3). "The plaintiff now elects to waive the wrongful element in the

sale by the defendant to itself hereinbefore mentioned for the purpose of maintaining this action as a suit in assumpsit, etc."

Under the authorities this waiver constituted a ratification of the act of the bank and of its cashier. This waiver of the wrongful element in the sale of the notes by the bank to itself, if any, ratified that sale, and ratified it according to its terms. The ratification in part ratified all..

The state supreme court erroneously held that this waiver and election ratified nothing. That waiving the wrongful element in the sale did not ratify such sale. This decision, notwithstanding the error, is final, as it does not in itself involve any fed-
22 eral question; but the waiver and election demonstrate that the action is on a contract which involves a federal question. It became and is a direct suit to enforce the express and implied terms of the alleged contract of agency.

Plaintiff in error does not claim that it could hold the notes under a contract of agency, or a purchase through such agency, and at the same time repudiate such agency or contract as ultra vires. It has never claimed title or possession under any agency.

Neither does it, in this court, claim that it could have held the notes against a proper demand for them with tender of advances thereon, under a claim of title by direct purchase from M. Anderson, for the state courts have in effect held that there was no direct purchase.

While the bank in its answer did allege such direct purchase, it was after the title, in any event, had vested in the bank by the act of the defendant in error himself, in waiving the tort and electing to sue on contract, and not against any claim for the use, possession or title to the notes.

III.

The question of the implied power of the cashier of a national bank to bind such bank by contract to engage in the business of selling mortgage notes on commission, and to assume the duties of such an agency is a federal question and is necessarily involved in the merits of this action independent of the corporate power of the bank itself.

It is undisputed that this action is based on a contract of that kind, and also undisputed that all acts and correspondence on the part of the bank was done by the cashier alone without other than the implied and customary powers of cashiers of such banks.

It is true the state supreme court held that the bank could not raise this question. In the opinion (page 43) Corliss, Chief Justice, says: "What we said in our opinion on the third appeal on the sub-"ject of the authority of the cashier to bind the defendant by creat-"ing the relation of principal and agent between plaintiff and de-"fendant is still applicable to the case on the record now before us. "In its answer and the brief of its counsel the defendant admits "that the writing of the letters referred to was its act and not the "act of an unauthorized agent. By its own pleading and admis-"sion it has precluded itself from raising the point that the cashier "had no power to bind it by agreeing that the bank would act as "agent for the plaintiff."

The decision of the State Supreme Court on this question is not final, and it is not supported by the record. The memory of the learned Chief Justice was at fault. The brief of plaintiff in error in that court did not contain any such admissions, but on the contrary, so strenuously denied such authority, that that
23 court deemed it necessary upon two appeals to decide or otherwise dispose of the question. Such admission, if made, would have been a proper part of the record on this writ of error and should have been included, while the entire brief was not a proper part of the record to show what it did not contain.

The answer which is part of the record contains no such admissions. The answer (Paragraph VI, Page 5) "Admits that defendant received said telegram from plaintiff and that defendant wrote plaintiff as follows," setting out the letter of October 7th in full, signed "S. S. Titus, Cr.," and (Paragraph IX, Page 6) alleged that prior to October 5th, 1891, by and in certain letters and telegrams Anderson offered to sell the notes to the bank at certain discounts, and the bank offered to buy at other and greater discounts. There is no reference to any letter or telegram constituting or held to constitute a contract of agency, and especially denied the alleged telegram of October 3rd.

These expressions, that the bank wrote the letter and made the remittance of October 7th, 1891, and that prior to October 5th, 1891, the bank offered to purchase the notes at certain discounts if standing alone and unexplained would amount to no more than a formal admission that those particular acts were the acts of the bank, insofar as any officer, or possibly all of the officers of the bank, could make them its acts, for being a corporation and not a natural person, no admission could amount to more than an admission that the officers of the bank did the acts; but coupled with an express statement of the facts and a copy of the letter showing it was written by the cashier, the statement amounts to no more than that the letter was written by the cashier.

This letter and the offers to purchase constituted no part of the pretended contract or agency, which as set out in the amended complaint consisted of the two telegrams of October 3rd and October 5th, and has hed by the state supreme court, of the letter of September 14th and the telegram of October 5th.

Construeing the answer as a whole, it amounts to a statement and admission that by and in certain letters and telegrams, the bank acting by and through its cashier, discounted or purchased the notes from Mr. Anderson. This was the act of the bank, because it was within the customary and usual powers of the cashier, and within the powers of the bank itself. If the cashier went outside his powers and undertook to make a contract of agency, the act was not the act of the bank either in law or in fact.

The bank offered to prove by proper evidence (Page 30) that no other officer or director or board of the bank participated in the transaction or authorized the cashier's acts. The
24 exclusion of this evidence restricts the cashier's powers for

purposes of this case to the implied powers of cashiers of national banks, which do not include the power to bind his bank by such a contract of agency.

The question whether the direct purchase of notes with the intent to rediscount them, or a dealing in notes as averred in answer is within the power of national banks is immaterial, since the State Courts in effect held that there was no such direct purchase and the plaintiff in error does not in thisCourt rely on such purchase.

IV.

The principles involved in the foregoing questions as to the right of the bank to claim immunity under federal statutes, from liability on account of ultra vires acts of its cashier, and the ultra vires contract of the bank itself, if any, are announced in:

Logan Co. Nat. Bank vs. Townsend 139 U. S. 67.

California Nat. Bank vs. Kennedy 167 U. S. or 362.

Farmers and Merchants Nat. Bank vs. Smith 77, Fed. Rep 129, (Circuit Court of Appeals, Eighth Circuit).

The application of those principles to the facts in this case we have endeavored to show.

V.

Plaintiff in error submits that it is not within the express or implied powers of a national bank to engage in the business of selling mortgage notes on commission, and that any contract by a national bank that it will assume the duties and liabilities of an agent to sell such notes and mortgages for other persons is ultra vires and void.

See The National Bank Act.

Farmers and Merchants Nat. Bank vs. Smith 77 Fed. Rep 129.

California Nat. Bank vs. Kennedy 167 U. S. 362.

The supreme court of North Dakota on the contrary held that when a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its power to collect the claim out of such collateral notes; that the bank as pledgee could not sell the notes, but could only collect them, and in furtherance of its power to collect the principal debt, it could, with the assent of the debtor, act as his agent in the disposition by sale of the this case is contracting to act for Anderson in the sale of these notes, kept entirely within the limits of its power. Citing:

Shinkle vs. Bank, 22 Ohio St. 516-524.

Holmes vs. Boyd, 90 Ind. 332.

John A. Roebling Sons Co. vs Bank, 30 Fed Rep. 744.

Reynolds vs. Simpson, 74 Ga. 454.

Wylie vs. Bank, 119 U. S. 361.

McCraith vs. Bank, 104 N. Y. 414.

First Nat. Bank vs. Nat. Ex. Bank, 92 U. S. 122.

And Morse Banks, Sections 77 and 78.

This is an erroneous construction of the National Bank Act, which provides that national banks shall exercise all such inci-

dental powers as shall be necessary to carry on the business
25 of banking, by discounting and negotiating promissory notes, and loaning money on personal security.

It is contrary to any reasonable construction of the statute. It is not supported by the cases cited, and it is not applicable to this case.

Under the National Bank Act, a national bank may do and may bind itself by contract to do many things not primarily relating to banking. But to act as agent for the sale of mortgage notes for another to third persons would not seem to be one of such things.

To protect itself from loss a national bank may in good faith acquire title to, and temporarily operate and control almost any class of property and contract liabilities in so doing. To do so is not only proper, but is frequently the necessary and only protection against loss of discounts and money loaned."

Plaintiff in error submits that it is never necessary, and therefore never proper that a national bank act as agent to sell the property of another. That the duties and liabilities of such an agency even for the sale of pledged notes and mortgages are never among those which the bank itself must necessarily assume in order to protect itself from loss.

The powers, duties, and liabilities of such an agency are not included in nor incidents of the pledge. They must be conferred and assumed by an independent contract. Under the statutes of North Dakota, a pledgee, as such cannot sell collateral notes and mortgages at private or public sale, but can only collect them.

If not wholly inconsistent with the character of pledgee, such agency is certainly not an incident of or supported by the pledge.

But even if such agency be not always, and by its very nature, outside of those incidental powers necessary to carry on the business of banking, as we believe it to be, if it might
26 ever be included in such powers of a national bank; it would be only when it became reasonably necessary to protect the bank from loss. Such reasonable necessity must be made to appear. It will not be assumed without proof, nor from the contract of agency alone. It must also appear that the power, if any, to assume the duties and liabilities of such agency, was exercised in good faith, for the purpose of protecting existing interests of the bank and not alone for the commissions or profits of such agency.

It should be shown at least, that the principal debt was due or doubtful, the debtor in failing circumstances, the security insufficient, or a just apprehension of the loss of the claim, and reasonable grounds of belief that by assuming the duties and liabilities of such agency the loss would be prevented or reduced.

None of these things do appear, while the contrary was in fact true and does appear. The principal debt was not yet due. The $2,000.00 loan to Mr. Anderson was made April 6th, 1891 (Page 2), was due in eight month (Page 24) and had from sixty to eighty days to run at the time of the pretended contract of agency.

There was no pretense that Mr. Anderson was insolvent or in failing circumstances. The security was unquestionably ample. The bank certainly did invest $6,397.48 in the collateral alone, and the defendant in error claims that it was then worth $7,630.00. The interest was 12 per cent per annum (Page 24), which was certainly remunerative. No loss was or could have been anticipated. No such contract or agency could have been entered into in good faith to prevent or reduce any anticipated loss. There is not the slightest grounds for belief that such agency could or would accomplish any purpose legitimately connected with the business of banking.

The contract in relation to the notes embraced in the correspondence from August 11th to October 7th, 1891, whether a contract of agency or discount, was a separate transaction, independent of the original loan and pledge, and as such it was entered into by the cashier of the bank to secure a further profit, either discount or commission, in addition to the discount on the $2,000.00 loan, which was already secure.

We claimed and still believe that in truth and intent there was no agency. That the transaction was one of discount, with a misunderstanding as to the amount of the net proceeds,
27 and that the agency and all arguments based thereon are hypothetical only. The decision of the state court, however, has bound us to that hypothesis. If there was an agency it was because the reference to and charge of a commission by the cashier made it one in law, and as such it was an independent transaction in a business not authorized by the National Bank Act, nor incidental to any business so authorized, but for an independent profit in the form of such commissions and as such was ultra vires and void.

If there be any relation between such agency and the collection of the $2,000.00 loan, such collection would be only an incident and not a necessary incident of the agency; not the principal transaction to which the agency would be incidental and necessary. A national bank cannot engage in every business transaction merely because some of its results may incidentally promote, hasten or induce the collection of a debt, much less a debt not due and amply secured. If so, there is no class of business a national bank might not enter into as agent, partner or employer of its debtors.

In this case there can be no sincere claim that the collection of the debt was an object of the transaction, or was taken into consideration, much less that it was the principal transaction for the accomplishment of which the agency was necessary.

None of the cases cited by the state supreme court support its decision, or are so nearly in point as to need examination. Wylie vs. the Bank, 119, U. S. 361, cited as most nearly in point, rests on totally different facts and different principles. There it was held competent for a national bank, as the best means of recovering its own property, stolen with that of another, to undertake the recovery of all, and that if it did so, it was liable for want

of digilence, skill and care in the undertaking, or for wrongful use of the property of the other to recover its own.

In other words, the contract was competent if it was the necessary or best means of recovering its own property. It was liable if the property of the other was lost by its tortious acts.

The supreme court of North Dakota further held that whether the contract of agency, as such, was ultra vires or not; if the bank has in fact assumed to act as agent, it must be held to the
28 ordinary duties and obligations of an agent. Special attention is called to "Assumed to act," as a very supple and convenient, but not especially definite phrase. If it is meant thereby to say, "If the bank has in fact acted as agent, has exercised the powers of such agency, has in fact sold the notes, it might be good law, but would have no basis in fact." The bank did not in fact act as agent did not exercise the powers of such agency, and did not ,in fact sell the notes. The attempted purchase of the notes by the bank was not, in fact acting as, or exercising the powers of such agent. but was in violation of such contract of agency, if any. It is not pretended that either the bank or Mr. Titus, the cashier, misled or decieved Mr. Anderson, and certainly neither one sold the notes, and there was no other act contemplated by such an agency. They do not assert or complain of its acts as agent, but the acts of the agent outside of and in violation of his duties as such.

There is the expression that the bank sold the notes to itself. This, of course, is an inaccurate figure of speech, and if it meant more than an attempted purchase by the bank, not under, but in viloation of the powers and duties of such agency it would be contrary to the facts and decision of the state court.

Assumed to act can have but one other meaning equivalent to undertook to act, and contracted to act, which brings us back to the validity of the contract.

The supple uncertainty of the phrase was convenient, but misled the learned Chief Justice to use it with the first meaning with regard to the law, and the last meaning with regard to the facts.

To return to this decision of the state court. Is the principal as stated good law? Can a bank contract by acts to assume duties and liabilities which would be ultra vires as an express contract? Can it do indirectly what it cannot do directly? Has not the state court again confused contract with tort?

It is true that a national bank is liable for its own tort whether committed in pursuance of a business within or beyond its corporate powers. If it acts, its acts must not in themselves be tortious. As in the case of Logan Co. Nat. Bank vs. Townsend 139 U. S. 67, a national bank must not wrongfully retain bonds, although it obtained them under an ultra vires contract to return them. For its own acts as such, a national bank must be responsible, but for its acts as constituting a contract, and imposing contract relations they must be governed like any other form of contract, and be void if the contract be ultra vires.

The state supreme court in its opinion as originally filed stated as its view of the law (Page 43): "The plaintiff, when he authorized a sale by defendant as his agent, did in contemplation of law decline to sell to the agent on the terms agreed or any terms, there being no evidence that he ever assented to the purchase of the notes by the agent itself. A principal always in contemplation of law is in the attitude of being unwilling to sell to the agent on any terms. Whether the plaintiff was authorized by the law to act as agent for the plaintiff is therefore of no moment, because, even if we concede this proposition, it still remains true that he had never agreed to a purchase of the notes by the defendant, and hence it follows that defendant's assumption of ownership of them, as though plaintiff had assented to a purchase of them by defendant constituted a conversion thereof." This portion of the
29 opinion was stricken out after the petition for rehearing, and constitutes no part of the reported opinion in the 6 North Dakota Report. Page 509. But as the record in this Court was prepared from the opinion as originally filed, it is contained in this record and requires some attention, as it intimates, but does not expressly assert an independent tort in the assumption of ownership by defendant.

As an argument this would be plausible, as a decision it is ambiguous and uncertain.

In another place (Page 42) the Court held that since the agency was created by a written contract, it was not material whether Mr. Anderson relied upon or considered the bank his agent, that the contract in law created the relation of principal and agent. Here it holds it was not material whether the contract was effectual in law since a principal always in contemplation of law is in the attitude of being unwilling to sell to his agent.

But the language of the opinion above quoted raises another question. It takes for granted that the bank assumed the ownership of the notes and holds that it thereby converted them. The expression, assumption of ownership, as used in the opinion alone, and unexplained, is ambiguous. If it be meant thereby that the bank undertook ,agreed and attempted to become the owner by contract, it is true, but that in law does not constitute a wrongful conversion. Nor does the state court so hold except as a violation of its trust as agent.

If it be meant thereby that the bank without authority exercised the right of ownership over the notes to the change of their condition or the exclusion of the owner's rights; that would constitute a wrongful conversion, but is contrary to the undisputed facts, and the state supreme court does not so hold.

If it was intended thereby to say that the bank claimed to be owner, it is correct as an expression of opinion that the transaction was a purchase from Mr. Anderson. The cashier so believed the transaction to be. But not as a claim which was ever coupled with an exercise of dominion over the notes to the exclusion of Mr. Anderson's rights as owner.

We do not claim in this Court, as we did in the court below,

that the bank actually acquired the legal title to the notes by direct purchase from Mr. Anderson, since the state supreme court held there was no evidence that Mr. Anderson consented to such purchase, and not involving a federal question, that issue is settled, right or wrong. What we do claim is that, conceding Mr. Anderson to have been the owner, subject to the pledge, until by this action he divested himself of his title, the bank did nothing in violation of its duties as pledgee, did not exercise any dominion over the notes not authorized by the pledge, did not exclude Mr. Anderson from any right, title, interest, use or possession in or of the notes to which he was entitled as pledgor, did not violate any actual trust reposed in it, did not, in fact, injure Mr. Anderson to the slightest extent nor change his relation to the notes except as he changed it by this action, and that the state courts did not hold that any of these things were done except by the ambiguous expression "assumed to act," and "assumption of ownership," which, if intended in the sense of an exercise of ownership, to the exclusion of any right of Mr. Anderson, was contrary to the undisputed facts, and the facts which the [illegible] court says are undisputed.

No manipulation of the evidence, or of the undisputed facts, or of the legal principles applicable to the case, or even of the new principles of law announced by the State Court, can change the obvious fact that the only violation, if any, of any right or duty, was the attempted purchase of
30 the notes contained in the letter of October 7th, 1891, with the remittances, which should not in law amount to a conversion even if there was a valid agency, which even under the decision of the state court amounted to a conversion only because it was a technical violation of the pretended contract of agency, and that the contract was that the bank should sell mortgage notes for Mr. Anderson to third persons on commission in transactions not necessary or incidental to any legitimate business of the bank.

VI.

There remains for consideration the question whether the pretended contract of agency was one which was within the implied powers of the cashier of a national bank to make on behalf of his bank.

Section 16 of the National Bank Act provides that a national bank shall have power "To exercise by its board of directors, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking" &c.

The cashier of a national bank is a recognized officer thereof, and his powers are fairly well settled and need not be enumerated here. It may be said in general. The cashier is the chief executive officer through whom the whole financial operations of the bank are conducted.

Merchants Bank vs. State Bank, 10 Wall 604-650.

Fleckner vs. Bank, 8 Wheat 338.
Caldwell vs. Mohawk & C. Bank, 64 Barb. 333.
Bissell vs. First Nat. Bank, 69 Pa. St. 415.
He has charge of its property, money and securities.
Wilde vs. Bank, 3 Mason (C C.) 505.
Franklin Bank vs. Stewart, 37 Me. 519.
He is superintendent of its books of accounts.
Sturgis vs. Bank, 11 Ohio, St. 153.
Baldwin vs. Bank of Newberry, 1 Wall 234.
His acts within the scope of the general usage, practice and course of business conducted by the bank will bind the bank in favor of third persons possessing no other knowledge.
Minor vs. Mechanics Bank, 1 Pet. 46-70.
Burnham vs. Webster, 19 Me. 232.
Wakefield Bank vs. Truesdell, 55 Burb 602
He has power to transact as the executive officer of the bank the regular routine business.
Morse vs. Mass. Nat. Bank, 1 Holmes (C. C. 209-211.)
He has power to draw checks and drafts upon the funds of the bank deposited elsewhere.
Merchants Bank vs. Bank of Columbia, 5 Wheat 326.
United States vs. City Bank of Columbus, 21 How. 356.
Chem. Nat. Bank vs. Kohner, 8 Daly 534.
In the last case the Court held, "A cashier is the business officer of a bank, but only in the sense of one who transacts and not one who regulates or controls its affairs. His duty has
31 reference to daily routine business and not to matters involving discretionary authority, which belongs, unless delegated, to the board of directors, as has been quaintly said. 'They are the mind and he is the hands of the corporation,'" and the court held that a cashier had no power to compromise debts
A cashier has no power to discharge the surety on a note. Savings Association vs. Saitor 63 Mo. 24. Merchants Bank vs. Rudolf, 5 Neb. 527, and Bank vs. Haskell, 51 N. H. 116.
A cashier cannot transfer non-negotiable paper.
Holt vs. Bacon, 25 Miss 567.
Burrick vs. Austin, 21 Barb 241.

In brief, the implied powers of the cashier of a National Bank are limited to the usual and customary business of banking, and the ordinary details of such business, and do not extend to any unusual or extraordinary business or transaction which the bank might deem best or necessary for the collection of a doubtful claim or to prevent or reduce an anticipated loss.

Circumstances might render it best or necessary that a bank should purchase, hold and operate temporarily a farm, a factory, or a railroad; but such business or transaction being outside of the usual business of banking or any detail of such business and involving discretionary authority, must be done or expressly authorized by the board of directors. In this case, even if the principal debt from Mr. Anderson to the bank had been past

due and doubtful, if the security had been questionable and liable to become worthless or insufficient; if it had been the best or necessary means of collecting the claim, that the collateral notes and mortgage be sold and the necessary and only way was for the bank as Mr. Anderson's agent to sell for him to a third person, and such agency had been within the incidental powers of the bank, it would still be true that such agency would be so far outside the usual business of banking and so unusual in character as to require the action of the board of directors.

Much more so when in fact none of these things were true. No necessity for such action existed, the business engaged in was independent of the principal debt, and was entered into solely for the profits of the transaction itself.

While a bank may under extraordinary circumstances exercise extraordiary powers if necessary and proper means of conducting its legitimate business, but such extraordinary powers must be exercised by the board of directors and not by the cashier without express authority.

There is no pretense that Mr. Titus, the cashier, had any express powers in the matter or any except the implied authority common to all such officers. The court excluded evidence that he did not have, and held such evidence immaterial. (Page 30.)

In Farmers and Merchants National Bank vs. Smith, 77 Federal Reporter 129-135, it was expressly held by the Circuit Court of Appeals that the cashier of a national bank did not have power to bind his bank by any contract or act in such an agency. That even an endorsement or guaranty of commercial paper, an
32 act usually within the implied powers of a cashier, if done as part of, or carrying out the business of selling mortgage notes on commission, was totally void and did not bind the bank.

The supreme court of North Dakota in this case, has always in its opinions treated the subject as if the bank were a natural person acting through agents, and subject to the same legal principles relating to ratifications and estopple, and not a creature of limited powers in itself, and only acting through its board of directors, and lawfully authorized officers and agents.

A natural person may ratify the acts of his agent in many ways. A bank only by the proceedings which would have originally authorized it, and only in case the bank could originally have authorized it.

A natural person may be estopped by his own acts or omissions. A bank is not estopped by the acts or omissions of its officers or agents unless they had the authority to bind it in that particular manner.

The law is well settled in this Court in favor of the right of a National Bank to plead its want of power. California National Bank vs. Kennedy 167 U. S. 362, and cases therein settled. That it may assert the nullity of an act which is an ultra vires act. That such act cannot be ratified nor its repudiation estopped in any way if it were not within the corporate power of the bank originally.

It is also true that the unauthorized act of a cashier if within the corporate power of the bank acting through its board
33 of directors may be ratified, but only by the same board, and there can be no estopple to deny his authority save by the act of such board.

But in this case, there was nothing in the way of ratification or estopple. The bank did not obtain the notes through the agency, did not retain them under it, or under the transaction, whether as an agency or discount. That it has always denied the agency.

In this case, the law, as we believe it to be, is fortunately consistent with the absolute justice of the case. The absolute injustice of the judgment rendered by the state courts and on the grounds avowed by the defendant in error and upheld by the opinion of the state supreme court tends to shock the moral sense and destroy confidence in courts and the security of property.

We do not claim that Mr. Anderson had no rights in the transaction out of which this action arose. We believe Mr. Anderson honestly meant a discount of $630.00 more than the bank understood it, and that he had the right to rescind and reclaim his paper. We believe Mr. Titus had no right to claim and retain a commission of $35.00 in the transaction, and if Mr. Anderson claimed it, he was entitled to that sum. But to hold that he can disregard his own offers and his just claims and force his paper upon the bank at a fictitious valuation, by the flimsy web of technicalities and misapplication of legal principles affords no one justice.

Upon the grounds that the pretended agency was not within the corporate powers of a National Bank nor the implied powers of its cashier to make, and that it is ultra vires and void either as the act of the cashier or of the bank itself and affords no basis for this action and the judgment rendered therein. This action is respectfully submitted to the end that such judgment may be reversed if to the Court it should seem such reversal is just and proper under the law.

Dated Grand Forks, North Dakota, October 15th, 1898.

BURKE CORBET,
Attorney for Paintiff in Error,
Grand Forks, N. D.

No. 223.

Supreme Court of the United States

Brief of Corbet for Pl. in Err.

OCTOBER TERM, 1898.

NO. 223.

Filed Dec. 16, 1898.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

ON SECOND MOTION TO DISMISS AND AFFIRM.

BRIEF OF PLAINTIFF IN ERROR.

BURKE CORBET, ATTORNEY FOR PLAINTIFF IN ERROR.

The Plaindealer Co., Grand Forks, N. D.

Supreme Court of the United States

OCTOBER TERM, 1898.
NO. 223.

FIRST NATIONAL BANK OF GRAND FORKS, NORTH DAKOTA,

Plaintiff in Error.

vs.

ALEXANDER ANDERSON,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

ON SECOND MOTION TO DISMISS AND AFFIRM.

BRIEF OF PLAINTIFF IN ERROR.

During December, 1897, the defendant in error, Alexander Anderson, by Phelps & Phelps, his attorneys, served upon the plaintiff in error his notice of a motion to be submitted to this Court January 10th, 1898, to dismiss the writ of error in this case and affirm the judgment of the state court, and served therewith his motion, and his brief thereon, and presumably filed such notice, motion and brief with proof of service thereof with the clerk of this court.

January 7th, 1898, the plaintiff in error filed with the clerk of this court its brief on such motion, pointing out the existence of a federal question, and wherein a determination of such question

against the plaintiff in error was necessarily involved the merits of the action and in the decisions rendered and the judgments entered against it in the district and supreme courts of North Dakota, and wherein the plaintiff in error claimed in such districts and supreme courts a right and immunity from liability on account of the alleged acts of its cashier and alleged contract of the bank itself as ultra vires under a statute of the United States, and that each of such courts denied such immunity.

October 24th, 1898, the plaintiff in error filed with the clerk of this court its brief on the merits of this action, including a statements of facts, its specifications of errors and arguments therefrom that a federal question was necessarily involved in the merits of the case and in the decision and judgment of the state court, and that such federal question had been erroneously decided by the state courts against plaintiff in error, and that the state courts had erroneously denied an immunity claimed by plaintiff in error under the statutes of the United States from liability for ultra vires acts of its cashier, and ultra vires contracts by the bank itself.

In this case all questions suggested by the motion are necessarily involved in the merits of the action, and every question involved in the merits is raised by the motion. Any brief argument, or decision of the motion requires the same examination necessary for a determination of the case itself.

The entire brief of the plaintiff in error on the merits, is applicable to the questions suggested by the motion. The statement, pages 3 to 9, and the specifications of errors, pages 9 to 14, as the basis of the argument. The argument, pages 14 to 21, that the federal questions raised are necessarily involved in the merits and in the judgment, and pages 21 to 29, that such questions were erroneously decided and the immunity erroneously denied.

Plaintiff therefore asks the court to refer to its brief on the merits on the consideration of this motion.

We supposed, and still think we covered in our former briefs, all points which properly arise from the record; certain claims and arguments advanced by counsel for defendant in error however, lead us to ask the indulgence of this court while we answer them.

Counsel for defendant in error in his brief and argument on this motion states as facts many things which do not appear in the record. He states that the plaintiff in error, both in its amended answer and in its original answer pleaded its own agency for Mr. Anderson. See his brief, page 9, folio 34. There was

never an amended answer. There was an original answer to the original complaint, neither of which appears in the record either in full or by quotations therefrom. The original answer was amended by leave of court and the amendment appears in the printed record at pages 8 and 9. And there was also its answer to the amended complaint, which appears in the printed record at pages 4 to 8 thereof in which plaintiff in error expressly denied any agency. And that answer speaks for itself.

Counsel for defendant in error cites in support of this statement certain expressions extracted from the opinions of the state supreme court that plaintiff in error admitted the agency.

Isolated expressions extracted from long documents are proverbially untrustworthy, and we dislike to conduct any argument on such basis. The expression found at page 40 of the printed record, and with the context shows that it was neither a quotation from a pleading, nor a judicial determination of any issue then before the court. The subject matter under consideration at that point was not a change of the answer, but of the complaint, and the effect of such change upon a deposition as to value, and the entire matter is wholly foreign to any question before the court.

Unnecessary expressions in the opinion of the state court as to the meaning of a defunct and superseded pleading is not equivalent to a recital of such pleading in the record in this court, and do not constitute a basis for argument as to the effect of pretended admissions in such pleading.

There was in fact no admission of agency in any answer. The state court has not judicially determined, upon that issue presented to it, that the answer contained such an admission. It has as dicta, said that the answer admitted the agency, but has decided the question of agency upon the evidence of the letters and telegrams as constituting a contract of agency. The complaint did not allege an agency in fact, but only certain telegrams as constituting a contract of agency. A defunct answer where, as in this case, both the complaint and answer have been superceded by new and substituted pleadings, and upon substantially a new and different cause of action, is at most merely an admission of the allegations of such answer subject to proof, as any other admission.

Not only the answer to the amended complaint, but the amendment to the answer to the original complaint, raise the issue of agency, and raise the issue of any admission in the original answer and such original answer was not a part of the evidence in the state court.

An admission of agency, if any, would be foreign to any question before this court. An agency presupposes a contract express or implied, between the principal and the agent, which with the law determines their rights and liabilities. That there was a contract of agency between the parties to this action has been established by the decision of the state court. We say the decision was erroneous, but we suppose it is final. The question here is not the fact of agency or contract of agency, but its validity; was the agency found by the state court ultra vires and void?

If the plaintiff in error were a natural person competent in all matters to act personally, an admission of agency would dispose of the question whether the cashier, Mr. Titus, had authority on its behalf to make the contract of agency, but being a corporation which can only act through an officer ,an admission of agency or contract of agency, if made, can be no more than an admission that the officer so contracted. His authority remains a question of law.

This applies equally to the allegations in the answer to the amended complaint, that the bank wrote the letter and made the remittance of October 7th, 1891, and that the bank wrote certain letters and telegrams offering to purchase or discount the notes, which can at most only amount to an admission that the officers of the bank did these things in its behalf, and with the letters themselves showing they were all written by Mr. Titus, amounts merely to a statement that Mr. Titus did these things.

We have already shown in former briefs that none of the letters or telegrams constituting the alleged contract of agency were stated by such answer to have been written by the bank. The questions whether the acts of the cashier or the contracts of the bank itself as to agency, if any, are ultra vires would not be effected by the so-called admissions in the pleadings.

As we have pointed out in our former briefs, it is clear that the only conversion of the notes by the bank averred by the amended complaint, and contemplated by the opinion and judgment of the state supreme court consisted solely in an attempt by the bank, to accept for itself the offer of Mr. Anderson, and itself purchase the notes while under a contract with Mr. Anderson to act as his agent for the sale of the notes to third parties, a mere naked sale by the agent of its principal's property to itself, and not any removal, disposition, change, destruction, concealment, of or unauthorized act of ownership over the property.

This is the kind of conversion, if any, of which the bank was

guilty, according to the clear meaning of the pleading and the opinion.

Counsel for defendant in error does not now entirely abandon this position, but as a possible safeguard, in his briefs on these motions advances the new and further claim that there was a conversion regardless of any agency or contract of agency. See his brief on this motion, pages 15 and 16.

The acts claimed to constitute an actual conversion of the notes in his words are "That plaintiff in error, immediately following the telegrams entered up the collateral notes as its own property, and collected them as its own, without leave of defendant in error." See his brief Fol. 59, pg 15.

There are many sufficient answers to this claim. The first of which is that it is not supported by, but is contrary to the record. Mr. Titus as a witness for the defendant in error testified that there was an entry in the bills receivable register of the bank of the seven notes entered up as of the date of October 7th, 1891. See record page 17, and that five of the notes had been paid at the time of testifying, record page 25, which was on the 2nd or 3rd day of February, 1897; record page 11. There is no authority for the statement that the bank collected the five notes or any of them without authority from Mr. Anderson. It appears that one of the notes was paid by J. D. Phelps December 1st, 1892. Record page 27, and it does not appear when any of the other notes were paid, except that five have been paid February 2nd, 1897. There is no presumption that the notes were paid when due, and it is apparent that at least one was over due and unpaid at that date. Only two of the notes were due at the time of the commencement of this action, March, 1893. Under the original bailment as collateral for the loan of $2000.00 the bank was authorized, and it was its duty to collect the notes as they fell due. Owing to the commencement of this suit the bank had no choice but to retain and collect the notes.

We will not comment upon the sufficiency of the evidence to sustain the new claim of an actual conversion by entering a description of the notes in a bills receivable register, and a collection of five of them. This court does not consider such questions in cases like this. If it did it is apparent at a glance that such an entry in a private record and a proper and necessary collection of collateral notes pledged to it would not constitute a conversion, and the state courts have not held that they would.

Another answer is that defendant did not plead any such conversion, but the technical conversion of a sale by an agent of it's

principal's note to itself. The right to recover on account of an entry in a private register, and for the collection of the notes cannot be asserted for the first time in this court. Counsel says in his brief, folios 59 and 60: "Whether or not this conversion was the conversion set out in the complaint is immaterial." We do not think so. If evidence of such a conversion had been received without objection the district court of the state on proper application, would doubtless have amended the complaint to conform to the proof. But the district court would then have sent this new issue to a jury, or decided that the evidence was conclusive for or against such claim.

None of these things were done. If they had been done the issues of law, not of fact, then raised could have been passed upon by the state supreme court, but since they were not raised nor passed upon in the district court, they could not be and were not passed upon in the state supreme court.

The rule that this court assumes jurisdiction in such cases only where the federal question is involved in the merits of the case, refers to the case actually presented to and tried in the state court, not to a cause of action which might have been, but was not presented.

The state supreme court based its decision and judgment entirely upon the alleged contract of agency. Even that part of the opinion cited by counsel for the defendant in error, that the court deemed the question of ultra vires immaterial, which part the court subsequently struck out of the opinion, and excluded from the reported opinion in the state reports, but which appears in the printed record on page 43, does not say that the agency or the contract of agency was immaterial, but that it was immaterial whether such agency or contract was ultra vires.

The argument being that Mr. Anderson by making the contract of agency, in law declined to sell to the bank on any terms, and that the bank's assumption of the right to purchase the notes, or assumption of ownership against such refusal to sell constituted a conversion.

In our brief on the merits on pages 17 and 25, and in our brief on the former motion, page 9, we have undertaken to show that it was very material whether the alleged agency or contract of agency was ultra vires, and that the statement that it is not material is inconsistent with the basis of the decision as expressed in the opinion, and wholly unsupported by the record or any facts found by the court; we will not repeat that argument here.

The state supreme court upon re-examination of the opinion

was so dissatisfied with the proposition as to strike it, and all the arguments in its support from the opinion. It appears in the record because the proposed record was prepared from the opinion as originally filed before the rehearing, and was served and filed before discovering the change.

We may be bound in this as in all other respects by the agreed record. We may have no right to comment upon or even state the change in the opinion; we do not consider the change important, for it seems to us the proposition stricken out is so clearly erroneous as to be harmless, but our state supreme court is entitled to credit for the correction.

We need not comment upon the doctrine of the law of the case invoked by counsel for the defendant in error. It does not appear to have been raised or applied by the state supreme court. It could in no event have any application to this writ of error. Plaintiff in error could not have a writ to bring the case to this court until a final judgment in the court of last resort in the state. We obtained that writ in due time. It brings here for examination every federal question adversely decided by the state supreme court on the last appeal, regardless of the fact that such question was decided in the same way on a former appeal, otherwise the decision of the state court on a federal question controls this court.

Counsel, however, claims that the state supreme court on former appeals decided that the relations of the parties was that of principal and agent, that such decision became the law of the case, but the relation of the parties was a question of fact, not of law, and that question remaining in issue had to be tried at the last trial.

The last trial was an entirely new trial of every issue of fact. The record of that trial is all here and all that is material to the federal questions, as well as much that is not, is contained in the printed record.

Nor need we dwell on the law of torts as committed by a corporation. In our brief on the merits we undertook to make our position clear. Of course, we do not claim that a corporation is not liable for its own tort, or that a national bank may not be liable for the actual conversion of notes intrusted to its care.

We do claim that by the pleadings, the evidence, the undisputed facts and the decision of the state supreme court, and by each of them, there was no actual conversion, that the so-called conversions consisted of two factors only. First: The correspondence between the cashier and Mr. Anderson, construed to be a contract of agency. And second: The letter and remittance of

October 7th, 1891. We do not believe that in law these two factors constitute a conversion. Our supreme court has said that in North Dakota they do constitute a conversion, but that only makes it that kind of a conversion. If the pretended contract of agency contained in the correspondence be ultra vires and void, not the act of the bank, there remains but one factor, the letter and remittance of October 7th, 1891; this letter and remittance alone does not constitute a conversion, and our supreme court has not said that it did.

If it appear strange that a technical violation of an executory contract constitutes a tort, we disclaim all responsibility for the decision that it does; but that is the decision reduced to its plainest terms.

If the state supreme court had decided that such contract of agency and the letter and remittance did not constitute a conversion, there might not be any federal question involved. But, right or wrong, the conversion and judgment rests primarily upon the pretended contract of agency, and we say that contract was ultra vires, void, not the act or contract of the bank, and we claim immunity from liability on account thereof under the statutes of the United States.

Courts very justly regard with extreme impatience charges and denials of wrong doing or injustice between litigants beyond the regular and necesary practice in presenting the essential facts and the law, and we do not indulge in such charges or denials.

The uncalled for charges of wrong doing by the bank, a violation of duty, importing a moral depravity in its officers would not justify us in taking the time of this court to hear a denial. The claim for damage under rule 23 perhaps can be claimed as an excuse for saying that there is not a scintilla of evidence of any intentional wrong, or attempt to defraud or deceive, or any actual wrong ,or fraud or deception of Mr. Anderson. The so-called tort is a mere creature of judicial construction and a mutual mistake of the parties as to the legal effect of their correspondence.

We cheerfully acknowledge our present belief that Mr. Anderson meant a discount of five hundred dollars from the principal and interest, and claim as honest belief and a better basis therefor on Mr. Titus' part that the offer was five hundred dollars discount from the principal sum making an honest misunderstanding of six hundred and thirty dollars and some charges for taxes, etc. Mr. Anderson could have had his notes on demand and the return of the remittance, but believing he was right, commenced his action

first for the difference, failing in that his counsel sought to take advantage of the technical construction of a few expressions in Mr. Titus' letters, and force the notes upon the bank at the full principal and all accrued interest, without any discount. This is not right. Mr. Anderson has received every cent he contracted for, he has received it from the bank to whom he always intended to sell and in fact supposed he had sold. He did not demand a rescission on discovering his mistake. The hands of the officers of the bank have been scrupulously clean in the transaction.

Counsel for defendant in error speaks of the smallness of the sum, to contest so long and to bring to this court. It is small but the very smallness of the sum compared with the expense necessarily incurred in the defense bespeaks the good faith of the bank in this defense, the consciousness of right, and the belief that somewhere the right must prevail.

We know that in this court the principles and not the amount involved receive the attention deserved.

We respectfully submit this motion.

BURKE CORBET.
Attorney for Plaintiff in Error.